NEW YORK STATE SUPREME COURT

KINGS COUNTY
320 Jay Street, Room 25.77
Brooklyn, NY 11201
#347-296-1031, FAX #347-296-1337

******* FAX COVER SHEET *******

TO: Hon. Leslie Leach **FAX** #718-520-2499
Administrative Judge, Queens Supreme Court

ADA Johnette Traill **FAX** #718-286-5820
Queens County DA's Office - Appeals Bureau

Ron Kuby, Esq. **FAX** #212-529-0644

FROM: Margaret S. Balles
secretary to Judge Matthew J. D'Emic

SUBJECT: **DECISION & ORDER - PEOPLE v JOHNSON, IND #2002/00**

DATE: October 26, 2006

**** Sending 14 pages, including cover sheet ****

Supreme Court
of the
State of New York

MATTHEW J. D'EMIC
JUDGE OF THE COURT OF CLAIMS

CHAMBERS
320 JAY STREET, ROOM 25.74
BROOKLYN, NY 11201
#(347)-296-1031

October 26, 2006

Hon. Anthony D'Angelis
Chief Clerk
Supreme Court, Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415-1568

RE: PEOPLE v TYRONE JOHNSON, IND #2002/00

Dear Mr. D'Angelis:

I am forwarding the original decision and order of the court on defendant's motion to vacate his judgment of conviction for filing by your office.

Thank you for your cooperation.

Very truly yours,

Matthew J. D'Emic
J.S.C.

cc: Hon. Leslie G. Leach
Ronald L. Kuby, Esq.
David Pressman, Esq.
Charles Testagrossa, Esq.
Johnette Traill, Esq.

M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
CRIMINAL TERM

PRESENT: HON. MATTHEW J. D'EMIC

THE PEOPLE OF THE STATE OF NEW YORK	**DECISION & ORDER**
- against -	Date: October 26, 2006
TYRONE JOHNSON, Defendant.	IND #2002/00

Defendant was convicted of Murder in the Second Degree on July 17, 2003 and sentenced to 20 years to life in prison on September 10, 2003. He now moves to vacate this judgment pursuant to CPL §440.10 (b), (d), (f) and (h). The primary bases for the motion are two meetings of the trial judge and assigned assistant district attorney which took place on December 12, 2002 and July 18, 2003, outside of the presence of the defendant and his attorney.

A hearing was ordered on the motion and testimony received on August 22, 2006. All submissions on the motion with affidavits and exhibits are part of the record as well as the testimony of Judith Memblatt, Esq., Justice Jaime Rios and Assistant District Attorney Eugene Reibstein.

The motion is denied.

FINDINGS OF FACT

On February 24, 2000, the defendant was arrested and charged with the February 5, 2000 murder of Leroy Vann. Defendant was represented by attorney Allan Brenner and tried before New York State Supreme Court Justice Jaime Rios in May 2002 and convicted of second degree murder. On November 12, 2002, the Queens District Attorney consented to vacate the murder conviction as a result of misconduct admittedly committed by the trial assistant, and the judgment was vacated on November 14, 2002. In his letter to Justice Rios and defense counsel consenting to the vacatur of defendant's conviction, Queens District Attorney Richard Brown stated that his office would "prior to any retrial, conduct a comprehensive re-examination of every aspect of this case so as to be certain that the prosecution of the defendant is justified". The case was placed on the court's calendar for December 16, 2002.

Sometime before that adjournment date, the case was re-assigned to Assistant District Attorney Eugene Reibstein who was directed "to look at the whole case from the beginning, take it all and check it all out" (T, p.143).[1] One of Mr. Reibstein's major concerns was the credibility of a witness in the case, Henry Hanley, who had recanted his testimony and, thereafter,

[1] References are to the transcript of the August 22, 2006 hearing.

retracted the recantation. As the adjourned date approached, the prosecution, realizing he was not nearly ready for trial, contacted defense counsel Brenner to advise him so. Since Mr. Brenner was at this time practicing law in Connecticut, both sides agreed to a continuance of the case past December 16 and Mr. Brenner agreed to Mr. Reibstein adjourning the case outside of his presence.

On December 12, 2002, Mr. Reibstein went to Justice Rios' courtroom and was directed by court personnel to chambers where he entered the judge's office and advised him of the need for and counsel's agreement to an adjournment past December 16th. According to Mr. Reibstein, the judge asked when the case would be ready for trial and Mr. Reibstein explained he was still investigating the case, including questions about the credibility of the witness Henry Hanley and that the judge voiced his own doubts as to the believability of that witness, including some talk about Hanley's testimony about cars at the crime scene. ADA Reibstein remembers the rest of the conversation as small talk about a Las Vegas vacation and mutual acquaintances. Justice Rios, in turn, remembers Mr. Reibstein being announced and entering his office. He then advised the judge of his need for an adjournment and the consent of Mr. Brenner to his making the request. The judge has no other recollection of the meeting.

Ms. Memblatt, who was Justice Rios' principal law clerk at the time and had been in his employ since January 1994, remembers the meeting quite differently. She could only hear Justice Rios, not ADA Reibstein, and recounts something of a soliloquy where the judge was talking "basically in a narrative fashion where he was going through Mr. Hanley's testimony and explaining how, in his opinion, it couldn't possibly have happened that way - the murder at issue in this case could not possibly have happened the way Henry Hanley testified to" (T, p.12) and that "the photographs proved that Hanley was not telling the truth" (T, p.71). Ms. Memblatt did not hear any small talk, nor, apparently, did she hear any mention of a consent adjournment. She also made short memoranda of this meeting on five post-it notes.

On December 16, 2002, the case appeared on the court's calendar and was adjourned until mid-January 2003, due to the fact that the People were still investigating the case. The defendant's second trial began on June 30, 2003 and he was again convicted of murder on July 17, 2003.

On July 18, 2003, the day after the conviction, Mr. Reibstein remembers going to Justice Rios' courtroom to pick up his exhibits and encountering the judge who stated, in sum and substance, that "I might have trouble with the Appellate Division because of my summation...that I had been vouching for witnesses" (T, p.152)

and that he was slighted by the remark (T, p.162). Justice Rios again has no "specific recollection" of this, but admits he "may have threw him a one liner" so as to "bring him down to earth" (T, p.128). Aside from the location of Justice Rios, Ms. Memblatt concurs with Mr. Reibstein's memory of what happened.

On April 19, 2004, Judith Memblatt was fired by Justice Rios, and on April 29, 2004, she filed a complaint against the judge with the New York State Commission on Judicial Conduct alleging, among other things, judicial misconduct as a result of the December 12, 2002 and July 18, 2003 meetings between Justice Rios and Assistant District Attorney Reibstein.

CONCLUSIONS OF LAW

Defendant's motion to upset his murder conviction requires an analysis of three distinct claims: (1) whether he was deprived of his constitutional right to be present at a material stage of his trial when Justice Rios spoke about the trial evidence to Assistant District Attorney Reibstein on December 12, 2002; (2) whether he was deprived of his right to counsel both on December 12, 2002 and when the judge derided the prosecutor's witness vouching on July 18, 2003; and (3) whether the two meetings deprived him of a fair trial before an unbiased judge.

I. Right to be present at trial.

A criminal defendant has a right to be present at all material stages of his trial (*People v Dokes*, 79 NY2d 656; *People v Sloan*, 79 NY2d 386.1; CPL 260.20), which includes, of course, the core segments of the trial from jury impanelment to verdict; but also includes ancillary proceedings where the presence of a defendant bears a substantial relationship to his ability to defend himself against the charges (*People v Morales*, 80 NY2d 450). Thus, an accused absent from ancillary proceedings in which the lack of his particular knowledge and unique input will affect the fairness of the outcome of the case such as knowledge of his prior convictions in Sandoval hearings (*People v Aikens*, 208 AD2d 938), the ability to deny a vicious pre-trial rumor (*People v Engleton*, 207 AD2d 262) or to give input on his justification defense (*People v Douglas*, 29 AD3d 47) have all required reversal.

In such cases, no prejudice need be shown by the defendant and the denial of the right to be present during a material part of his criminal proceedings requires reversal or vacatur of the conviction (*People v Mehmedi*, 69 NY2d 759).

However, where ancillary proceedings do not affect the fairness of the outcome or where the benefit of presence to the defendant is insubstantial, such proceedings are not material

stages of the criminal trial. To prevail in such cases a defendant must show prejudice under both federal and state law *(People v Bailey*, 146 AD2d 789).

Thus, a defendant's absence from a determination on his fitness for trial (*People v Horan*, 290 AD2d 880), an in camera judicial questioning of reluctant witnesses (*People v Babb*, 226 AD2d 469), a child swearability hearing (*People v Morales*, 80 NY2d 450), and certain instructions to jurors (*People v Twyman*, 208 AD2d 576; *People v Smith*, 204 AD2d 748) are not material proceedings requiring the defendant's presence.

In this case, the prosecutor had defense counsel's permission to request an adjournment in his absence, as a courtesy. Thus, the portion of the December 12, 2002 meeting between judge and prosecutor respecting the adjournment was proper, both under the rules governing judicial conduct (22 NYCRR 100.3 [B][6]) and under appellate decisional law (*People v Martinez*, 204 AD2d 489).

The question arises, however, as to whether Justice Rios' exposition of his feelings about the testimony of Henry Hanley and discussion of photographic exhibits constitutes a material stage of the proceedings at which defendant had a constitutional and statutory right to be present. The judge himself is of the opinion that such a discussion would be improper (T, p.112), yet

impropriety does not equal materiality. Precedents of improper ex parte judicial conversations with jurors (*People v Lamont*, 21 AD3d 1129; *People v Moran*, 123 AD2d 646; see also *Rushen v Spain*, 464 US 114), and prosecutors (*U.S. v DeLeo*, 422 F.2d 487 at 499; *Williams J. Keane*, 1995 WL 745006 (EDNY, 1995); *People v Martinez*, 207 AD2d 695) provide guidance. In each of these cases courts have found the communications improper but not reversible because the communications did not take place at a material stage of the criminal proceedings.

In this case, the conversation of December 12, 2002 started properly but certainly drifted. Critical to the inquiry then, is whether Justice Rios was coaching Mr. Reibstein - in essence, conducting a tutorial for the prosecutor - as claimed by the defense; or simply giving an unsolicited opinion of the witness Hanley's testimony in response to the prosecutor's explanation of why he needed more time to be ready for trial.

Ms. Memblatt testified that it was the former; Mr. Reibstein, that it was the latter. Justice Rios did not recall anything but the request for a consent adjournment and small talk, and his testimony adds little to the inquiry. It is clear, however, that the testimony of Ms. Memblatt is colored by her personal disdain for Justice Rios. For years, she looked at the judge as a tainted

individual and her recollection of December 12, 2002 cannot be trusted because of that bias. In addition, she retracted another allegation made by her and admitted at the hearing that she reviewed the first trial transcript the night before the hearing which "refreshed her recollection as to the fact that when he was analyzing the evidence he was referring to the photographs" (T, p.86); important information that she never mentioned before. Troubling also, is the fact that she first gave light to these alleged improprieties on April 29, 2004 (T, p.37) ten days after she was fired by Justice Rios, while a man sat in jail. Consequently, her complaint appears more a case of seeking vengeance than seeking justice.

On the other hand, Eugene Reibstein testified credibly as to what took place in the judge's chambers. To summarize, he requested an adjournment, was asked when he would be ready for trial, explained he needed to do a lot more investigating, expressed dissatisfaction with witness Hanley and was told by the judge that Hanley was not a believable witness and the reasons why. Viewed this way, the conversation, which took place six months prior to trial does not constitute a material stage of the criminal proceedings, or affect the fundamental fairness of the prosecution. To conclude otherwise is to ignore the day to day realities of courtroom life and render almost every stray comment grounds for

reversal or vacatur (e.g., *People v Grier*, 273 AD2d 403). Moreover, rather than prejudice the defendant, the comments criticized the prosecution. To prevail, actual not speculative prejudice must be shown and the court determines that no such prejudice resulted from the judge's comments on the evidence. Instructive on this point is the First Department case of *People v Martinez, supra*, at pp. 699-700, in which the court held "it was error for the court to engage in ex parte communication with the prosecutor and to permit the prosecutor to conceal from the defense that [a police witness] was the subject of a criminal investigation". Despite this error the court affirmed the conviction (see also: *People v Christie*, 241 AD2d 699).

II. **Right to counsel.**

Defendant also contends that he was denied his right to counsel because Mr. Brenner was not present at the December 12, 2002 meeting between the judge and prosecutor and because Mr. Koenig, the attorney at his second trial, was not present at the July 18, 2003 meeting.

Again, the conviction will only be vacated on this ground if actual prejudice resulted. As stated above, the December 12, 2002 conversation strayed into improper territory but was more of a comment on public testimony, already known to defense counsel, and the subject of his cross-examination than anything else. No

decisions were rendered, no arguments were made and no advantages gained on December 12, 2002 other than an adjournment. Accordingly, defendant was not prejudiced by the absence of counsel, and he cannot prevail on this ground.

Likewise, Mr. Reibstein's running into Justice Rios on July 18, 2003, after the conclusion of the trial did not harm the fairness of the proceedings. The defense characterizes Justice Rios' comment as a denial of the right to counsel since it would have alerted counsel to file a motion to vacate the conviction. The court views the judge's remark as nothing more than an unsolicited gibe hurled at the prosecutor for no reason other than to deflate him (T, pp. 19, 52, 128, 151-152, 162-163), and not a ground to vacate the conviction.

III. Right to a fair trial.

The defendant argues further that Justice Rios, in his comments on December 12, 2002 and July 18, 2003 demonstrated a bias for the prosecution, becoming in effect, a stealth prosecutor, depriving him of a right to a fair trial. To the contrary, the statements made by the judge were critical of the prosecution's case in general, and of the prosecutor in particular. Cross-examination of Henry Hanley at both trials indicates that nothing was hidden from the defense attorneys and both pursued the witness' discrepancies and inconsistencies vigorously and effectively.

Moreover, neither side argues that Justice Rios betrayed any bias during the conduct of either trial.

This constitutes the Decision and Order of the court.

Matthew J. D'Emic
J.S.C.